IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 11818 of 2003

For Approval and Signature:

HONOURABLE MR.JUSTICE JAYANT PATEL

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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BACHUBHAI PATABHAI & 31 - Petitioner(s)

Versus

STATE OF GUJARAT & 2 - Respondent(s)

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Appearance :

MR DC SEJPAL for Petitioner(s) : 1 - 32.
GOVERNMENT PLEADER for Respondent(s) : 1 - 2.
RULE SERVED for Respondent(s) : 1 - 3.
M/S THAKKAR ASSOC. for Respondent(s) : 3,

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CORAM : HONOURABLE MR.JUSTICE JAYANT PATEL

Date : 17/11/2005

ORAL JUDGMENT

1.The short facts of the case are that the petitioners were appointed as daily wager employees and as per the petitioners, some of them were appointed from 1988 to

1991 as per the list Annexure A, but the very list shows that from Sr. No.15 onwards, they were appointed in the year 1999. It is an admitted position that none of the petitioners is appointed after undergoing regular selection process, nor there is a sanctioned set-up available of the Municipality for the post over which the petitioners came to be appointed.

2. The Resolution dated 9.8.2002 vide No.4 came to be passed by the Medical Board of Mahva Nagarpalika, whereby the appointment of the petitioners was extended for a period of three months. The District Collector in exercise of the power under Section 258 of the Gujarat Municipalities Act (hereinafter referred to as “the Act”) upon the application of the Chief Officer of the Municipality Respondent No.3 heein suspended the operation of the aforesaid Resolution dated 9.8.2002 of the Medical Board of the Municipality. He also suspended the other Resolution of the Municipality of Drainage Committee which is not the subject matter of the present petition.

3. As such in view of the order dated 9.12.2002 passed by the District Collector it was required for the Municipality to implement the decision of the District Collector, however, it has been stated by Mr.Sejpal, learned Counsel for the petitioners, during the course

of the hearing that such order of the Collector was not implemented by the Municipality and all petitioners continued as daily-rated employees even thereafter. It appears that thereafter the District Collector passed final order dated 22.7.2003 under Section 258 of the Act, whereby he continued earlier interim order passed by him for suspending the Resolution dated 9.8.2002 of the Municipality and also directed to the Municipality to forward the proposal for additional sanction since the posts were concerning to the hospital which is under the control of the Municipality. It is under these circumstances the petitioners have approached this Court by preferring the present petition for challenging the order dated 22.7.2003 passed by the District Collector to the extent of continuing the suspension of the resolution No.4 passed by the Medical Board of the Municipality dated 9.8.2002, the petitioners also have prayed for directing the Municipality to make the payment of salary of 10 months for which, as per the petitioners' services are rendered.

4. I have heard Mr.Sejpal, learned Counsel for the petitioners and Mr.Desai, learned AGP for the State abd Mrs.Pahwa for Chief Officer of the Municipality.

5. It may be recorded that in the present petition of

11.8.2003, while issuing notice, the interim order was passed directing for maintenance of status-quo. Thereafter, as the services of the petitioners were already terminated the matter once again came to be considered by this Court on 12.9.2003 and an interim order was passed of a mandatory in nature to the effect that the Municipality was directed to provide the same work to the petitioners, which were being given before the order of termination and as per the petitioners, thereafter the petitioners are taken back in service by the Municipality. It may also be recorded that it was also observed by this Court that the Municipality may expedite by sending appropriate proposal to the Government for sanctioning the set-up and recruitment of the staff. Thereafter the matter is admitted on 1.12.2005 and the ad-interim relief was continued. Therefore, it appears that on the date of the petition, the services of the petitioners were already terminated, however, in view of the interim order passed by this Court, the petitioners are in service, pending the petition.

6. Mr.Sejpal, learned Counsel for the petitioners, submitted that the order of the Collector is in breach of the principles of natural justice in as much as no opportunity of hearing is given to the petitioners by

the Collector before passing the impugned order. He also submitted that the petitioners were working in the hospital and with a view to see that the treatment to the patients are not paralyzed, the services of the petitioners came to be continued and he also submitted that the Collector has also found that the matter pertains to providing services of essential in nature and the District Collector ought not to have continued the stay order granted by him for suspending the resolution dated 9.8.2002. He submitted that he is not aware as to whether the Municipality forwarded the proposal to the Government in pursuance of the order passed by the Collector in sanctioning of the set-up or not. He submitted that in case such proposal is forwarded and the sanction is granted, the petitioners can be absorbed on such post and he submitted, therefore, that the order passed by the Collector deserves to be quashed and set aside. He submitted that the petitioners have continued in service even after the first interim order dated 19.12.2002 passed by the Collector and since they have worked for a period of 10 months, in any case, the petitioners would be entitled to the salary of the said period and, therefore, the direction may be given for payment of salary for the said period.

7. Mr.Desai, learned AGP for the State submitted that as such the first Resolution dated 9.8.2002 was for grating extension for a period of three months only and in his submission, the period of three months had expired even when the impugned order dated 22.7.2003 came to be passed and, therefore, the Collector could have decided the matter as having become infructuous. He submitted that he is not having the instruction regarding the proposal, if any, of the Municipality for grant of additional sanction to the set-up of the Municipality concerning to the present hospital. He, therefore, submitted that when the Collector had continued the earlier interim order passed, this Court may not interfere with the order passed by the Collector. Mr.Desai also submitted that as such after the order dated 19.12.2002 passed by the District Collector staying the resolution of the Municipality dated 9.8.2002, the petitioners could not have been continued in service and, therefore, in any case, the direction may not be given by this Court for payment of the salary and, therefore, he submitted that the petition may be may be dismissed by this Court.

8. Under normal circumstances, there cannot be any dispute to the proposition that before exercise of the power under Section 258 of the Act, opportunity of hearing is

required to be given to the affected persons and the position of law is settled. However, so far as the application of principles of natural justice is concerned, there cannot be any straight-jacket formula and it varies from facts to facts. If the Court upon action of the complaining party finds that there is conscious knowledge on the part of the persons and there is conscious waiver, Court may decline to interfere with the order, though is passed in breach of the principles of natural justice. If the matter is examined in light of the same, it appears that after the order dated 19.12.2002 passed by the Collector, the salary of the petitioner is stopped. The petitioners in this petition have not made any statement that the petitioners were not aware about the order dated 19.12.2002 passed by the District Collector suspending the resolution. On the contrary the reference is made by the petitioners in this petition to the said order dated 19.12.2002 without making statement that petitioner had earlier not known about the said order. Once the order dated 19.12.2002 is passed, as such, it was obligatory on the part of the Municipality to implement the order and the petitioners could not have been continued in service. However, instead of non-continuing the petitioners in service, it appears that

the Municipality discontinued to pay the salary. At that stage, the petitioners could have moved to the District Collector, being affected parties, for making representation, if they were so desirous being aggrieved. No such attempts were made by the petitioners, nor even any representation was made by the petitioners to the Collector for disbursement of the salary. It appears that only after the impugned order is passed finally, the grievance is raised by the petitioner by preferring the petition by raising the plea of the breach of principles of natural justice. Such plea on the part of the petitioners for breach of principles of natural justice does not appear to be bonafide, because if such contention is tested on the prudence, no employee would sit tight for a period of 10 months without even inquiry for non-payment of regular wages, which is to be paid every month. Under these circumstances, it appears that there is a conscious waiver on the part of the petitioners not to participate in the proceedings before the District Collector, which were pending under Section 258 of the Act concerning to the Resolution dated 9.8.2002. Therefore, in view of the aforesaid circumstances on facts, I find that the contention of the petitioner that the impugned order is in breach of principles of

natural justice should not be entertained. Further, if such contention, on the present facts are entertained, it may result into allowing the party to take undue benefit of his own default, which this Court would not permit while exercising its extraordinary, equitable and discretionary jurisdiction under Article 226 of the Constitution of India. Mr.Sejpal, learned Counsel for the petitioner, did rely upon the decision of the Division Bench of this Court dated 5.9.2005 in LPA No.1844 of 2004 for contending that if the order is passed by the Collector under Section 258 of the Act, without giving opportunity of hearing, the same would be bad in law. There cannot be any dispute to the application of principles of natural justice in normal circumstances, but it is not that this Court, while exercising its equitable, discretionary jurisdiction under Article 226 of the Constitution of India, shall entertain grievance of breach of principles of natural justice, irrespective of bonafide or malafide or conscious waiver conduct of the party, invoking the jurisdiction. As such in the said decision, the question of declining to entertain the contention from the mouth of the party who has not acted bonafide or committed conscious default, did not arise for consideration before the Court. Hence, the said

decision is of no help to the petitioner.

9. If the matter is strictly examined on the language of the resolution dated 9.8.2002, Mr.Desai, learned AGP, prima facie, may be right in contending that as per the said resolution the extension was granted only for a period of three months and the said period, in any case, was over when the impugned order came to be passed. As such, the said period was also over when the order dated 19.12.2002 came to be passed, but it appears that in the resolution dated 9.8.2002, the extension is considered for those whose period was to expire from 30th September, 2002 to till the expiry of the next period and further after the said period the petitioners were continued in service. Therefore, it cannot be concluded that on 19.12.2002 the District Collector had no power or valid reason to consider the legality of the resolution dated 9.8.2002 under Section 258 of the Act. Further, it appears that by the impugned order dated 22.7.2003 the District Collector has only confirmed the interim order already passed on 19.12.2002. It is an admitted position that the petitioners have not challenged earlier order dated 19.12.2002 passed by the District Collector suspending the resolution dated 9.8.2002 and, therefore, when the earlier order is confirmed by the Collector and when

the petitioners have chosen not to challenge the earlier order dated 19.12.2002, it cannot be said that any serious prejudice will be caused to the petitioners by confirmation of the earlier order as per the impugned order.

10.Apart from the above, it is an admitted position that none of the petitioners is appointed on the permanent post, nor any regular selection process is undertaken for appointment of the petitioners. All petitioners are appointed as daily-wagers and their appointment is until the requirement of the work. If the requirement in future is considered by the Municipality on permanent basis, the Municipality may move the proposal for creation of the additional sanctioned set-up and as such, the Collector in the impugned order has also recommended for forwarding the proposal by the Municipality for additional sanctioned set-up. It deserves to be recorded that creation of additional sanctioned set-up or sanctioning of the additional set-up would not confer any right in favour of any of the petitioners who are daily-wagers to be absorbed on permanent posts unless and until the regular process is undertaken by following the settled norms for public employment and the petitioners have competed together with the other eligible candidates and have stood by

merits. Even if the additional sanctioned set-up is available to the Municipality, it is not open to the Municipality to fill up such post without following the settled norms of public employment and at the most those who are in service as daily-wagers or who have joined without ungoing regular selection process, have got the right for consideration by competing with the other eligible candidates as and when such regular selection process is undertaken by the Municipality. Therefore, merely because a proposal is forwarded by the Municipality or that the same is to be considered by the State Government for additional set-up is no justifiable ground on the part of the petitioners to be continued in service, which is on account of the interim order passed by this Court in the present petition. Further, the Collector in the impugned order has found that the appointment of the persons on daily-rated basis by the Municipality is not in accordance with the instructions of the State Government. Such a ground considered by the Collector while exercising the power under Section 258 of the Act cannot be said to be unreasonable or arbitrary. As such those employees who are appointed on daily-rated basis cannot assert as of right that they must be continued even if the sanctioned set-up is not available. Their appointment

is depended upon the requirement of the work subject to the availability of the financial resources and upon compliance to the necessary formalities under the law, including the instructions as issued and may be issued by the State Government from time to time. If such right is read for the persons who are appointed without undergoing the regular selection process or who have joined the service by back-door entry, the same would be against the larger public interest and would also result into the deprivation to the other eligible candidates for consideration for the public post and, therefore, if the district Collector in exercise of the power under Section 258 of the Act has suspended the resolution of the Municipality and has confirmed the order of the suspension giving extension in service to the petitioners though regular sanctioned set-up was not available, such a decision on the part of the Collector cannot be said to be unreasonable or arbitrary. On the contrary, in normal circumstances, if the sanctioned set-up is not available, it would be required for the Municipality not to make appointment and thereby to create an additional burden upon the Municipality.

11. In view of the above, it cannot besaid that the order passed by the Collector of confirming the earlier stay

of suspension of the resolution dated 9.8.2002 is arbitrary or unreasonable, which deserves to be interfered or quashed by this Court under Article 226 of the Constitution of India.

12. The contention raised of behalf of the petitioners for non-payment of salary for 10 months deserves consideration. As such it appears that it was obligatory on the part of the concerned officers of the Municipality not to continue the petitioners in service after the order dated 19.12.2002 passed by the Collector, whereby the Resolution dated 9.8.2002 was suspended. It prima facie appears that the concerned Officers of the Municipality have shown their callous approach in implementation of the decision of the District Collector under Section 258 of the Act, more particularly when the said decision was neither challenged before the Higher Forum, nor any stay was granted against the said decision. If the Officers of the Municipality have acted dehors the statutory provisions and have shown callous approach in implementing the order passed by the Collector, it would be for the District Collector to initiate appropriate proceedings against concerned Officers/office bearers of the Municipality for non-compliance of the order passed by him dated 19.12.2002,

and while initiating the said proceedings, the Collector may also examine as to whether the burden of salary should be passed over to the Municipality or it should be ordered to be recovered from those who did not implement the decision of the District Collector dated 19.12.2002 as per the provisions of the Gujarat Municipalities Act. If the Collector finds that the matter deserves to be referred to the Higher Authority namely; to the Director of Municipalities, he may also examine the same. It is directed that the concerned Authority shall take appropriate steps in this regard and pass final order of payment of the salary to the petitioners for 10 months either from the fund of the Municipality and thereafter to recover the same from the concerned officer/office bearers of the Municipality, if ultimately found or such payment may be recovered from the concerned officers/office hearers of the Municipality, as may be permissible in law.

13. In view of the above, subject to the aforesaid observations and directions the petition fails. Subject to observations and direction, Rule discharged. Interim relief vacated. No order as to cost.

14. Mr.Sejpal, learned Counsel for the petitioners, after the pronouncement of the order, prays for continuation of the interim relief for some time so as to enable his

client to approach higher forum. Considering the facts and circumstances, it appears that, in any case, the period is over and the petitioners have continued under interim orders and they were not appointed on permanent post after undergoing the regular selection process and their appointment is on day-to-day basis, hence, the said request is declined.

17.11.2005 **(Jayant Patel, J.)**

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